77-519

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES NEWCOMB,

Petitioner,

VS.

JAMES BRENNAN and HENRY REUSS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on July 11, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on July 11, 1977 and is set forth in the appendix, pp. App. 1-10. The decision of the United States District Court for the Eastern District of Wisconsin was entered on November 15, 1976 and is set forth in the appendix, pp. App. 11-15.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Under *Elrod* v. *Burns* (1976) 427 U.S. 347 is it a violation of the United States Constitution for a deputy city attorney in a non-partisan office to be fired from his employment because he runs for Congress of the United States?

2. Did the Circuit Court of Appeals err (A) in holding that the petitioner served "at the pleasure" of his employer; (B) in its determination that the petitioner's First Amendment rights were outweighed by the interests of the respondents; and (C) in failing to address the equal protection cause of action pleaded as a second cause of action in the complaint?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves 42 U.S.C. Sec. 1983, the First Amendment to the Constitution of the United States, and Rules 12 and 56 of the Federal Rules of Civil Procedure and Rule 201 of the Federal Rules of Evidence.

2. The case involves Secs 3.03 and 4.28 of the Charter of the City of Milwaukee, Secs. 2-220.2(2) and 2-3 of the Milwaukee Code of Ordinances, and Sec. 63.29(1), Wis. Stats.

STATEMENT OF THE CASE

Petitioner is an attorney and in the relevant months of April and May, 1976 he was employed by the City of Milwaukee as Deputy City Attorney, a non-partisan political office. In April, 1976 petitioner decided to announce his candidacy for the office of Fifth District Representative to the United States Congress. This decision required that he run against respondent Henry Reuss, the present Representative from the Fifth District, in the primary election of the Democratic party. Prior to any formal announcement of his candidacy, petitioner informed respondent Brennan in early April, 1976 of his intention to run for public office and respondent Brennan initially did not object to these plans. Thereafter, respondent Brennan communicated petitioner's decision to respondent Reuss. The complaint alleges that the respondents then conspired to coerce the petitioner to withdraw his proposed candidacy by threatening to terminate his employment as Deputy City Attorney.

On April 23, 24 and 25 Brennan informed Newcomb that he disapproved of his candidacy. He also told Newcomb that he would be fired if he persisted in his plans to run against respondent Reuss. Nevertheless, Newcomb announced his candidacy on April 26, 1976.

Thereafter respondents Brennan and Reuss conferred and it was agreed that Newcomb would be discharged from his position as Deputy City Attorney by respondent Brennan. During the week following April 26, 1976 respondent Brennan again threatened to fire Newcomb. When Newcomb refused to withdraw from the race respondent Brennan discharged Newcomb from his position as Deputy City Attorney on May 3, 1976. The complaint further al-

leged that the respondents terminated petitioner's employment in order to render him financially incapable of supporting his family and to prevent him from maintaining a political campaign against respondent Reuss.

Finally the complaint alleged a second cause of action claiming the termination was a denial of equal protection.

Upon a motion to dismiss by respondents pursuant to Rule 12, Federal Rules of Civil Procedure, the District Court dismissed the action. On appeal the Circuit Court of Appeals for the Seventh Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE CASE INVOLVES AN ISSUE OF FIRST IMPRESSION.

In deciding the merits of the case Judge Swygert remarked:

> "... neither Elrod nor Lewis squarely faced the question of whether the policymaker exception should be extended beyond the paradigm situation in which a dismissed employee would, by the nature of his political affiliation, retard the effectuation of a new administration's policies.
>
> We therefore must determine as a matter of first impression whether the state's interest in permitting Brennan to fire plaintiff outweighs plaintiff's First Amendment rights." App. 8.

This statement is made after analysis of the applicable case law particularly *Elrod* v. *Burns* (1976) 429 U.S. 97 and Mr. Justice (then Judge) Stevens' opinion in *Illinois State Union Council 34* v. *Lewis*, 473 F. 2d 561 (7th Cir. 1972). The Court of Appeals clearly ruled that the interests of the plaintiff to enter the primary election for the office of Representative for the Fifth District to the Congress of the United States was a right protected under the penumbra of the First Amendment to the United States Constitution. Further it noted that the United States Supreme Court in *Elrod* had ruled that a certain class of public employees—policy makers—could constitutionally suffer abridgement of First Amendment rights in circumstances where they were members of opposing political

parties and espoused adverse political philosophy. The case at bar does not involve those circumstances—for the plaintiff was not of an adverse political party or philosophy to those who discharged him. His employment was in a non-partisan office. It is respectfully submitted that certiorari should be granted in order to rule on the question of first impression.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

(A) THE PETITIONER DID NOT SERVE "AT THE PLEASURE" OF HIS EMPLOYER.

Both the Court of Appeals and the United States District Court indulged a particularly fatal incorrect factual assumption. By the apparent vehicle of "judicial notice" it was determined that the petitioner served at the pleasure of the respondent Brennan. This judicial notice short-circuited Rule 56 summary judgment and was violative of Rule 201(e) of the Federal Rules of Evidence providing an opportunity to be heard as to the propriety of the taking of judicial notice. The conclusion made was erroneous. In fact the petitioner did not "serve at the pleasure" of the City Attorney. The applicable provisions of the Milwaukee Charter and Code of Ordinances can be read only to provide that an appointed officer holding the position held by the petitioner, i.e. Deputy City Attorney, can be discharged or dismissed from office only for malfeasance and upon the vote of a majority of the members of the Common Council pursuant to the provisions of Sec. 4.28 of the Milwaukee City Charter and Sec. 2-3 of the Milwaukee Code of Ordinances. Contrary to the determination made by the District Court and affirmed by the Court of

Appeals the respondent Brennan was not at liberty to discharge the petitioner at his pleasure. Since the cause of action was founded under the Civil Rights Act 42 U.S.C. Sec. 1983 this concept should not have been pivotal. However, its introduction by the respondents and acceptance by the court was unfortunately and erroneously critical.

The case is a classic example of how error can be compounded by failure to comply with Rule 56 of the Federal Rules of Civil Procedure. Relevant is Mr. Justice Stevens observation in his dissenting opinion in *Estelle* v. *Gambel,* (1976) 429 U.S. 97.

> "The . . . test is not whether the facts alleged in the complaint would entitle the plaintiff to relief. Rather, it is whether the Court can say with assurance on the basis of the complaint that, beyond any doubt, no set of facts could be proved that would entitle the plaintiff to relief. . . .
>
> Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, this 'is another instance of judicial haste which in the long run makes waste,' Dioguardi v. Durning, 139 F.2d 774, 775 (CA 2 1944) (Clark, J.), cited with approval in *Haines* v. *Kerner,* supra, 404 U.S., at 521, 30 L.Ed. 2d 652, 92 S.Ct. 594."

In the case at bar, on the state of the record at the time of decision on the motion to dismiss, the only appropriate issue for resolution was: Did the complaint set forth a recognized cause of action? It obviously did. The District Court improperly considered matters dehors the record in deciding the motion without affording petitioner the opportunity to present evidence in opposition. See Rule 201, Federal Rules of Evidence. The motion to dismiss was thereby improperly transformed into a motion for summary judgment. Had the letter of the procedural

law been followed the Court would have been advised of the applicable provisions of the Milwaukee Charter and Code of Ordinances which refute respondents claim of service "at pleasure", see Secs. 4.28, Milwaukee Charter, and 2-3-Milwaukee Code of Ordinances.

(B) ON A BALANCING OF INTERESTS TEST THE FIRST AMENDMENT RIGHTS OF PETITIONER WERE NOT OUTWEIGHED.

With respect to the merits of the case the Court of Appeals rationale in determining that the First Amendment rights of the petitioner could be abridged by the respondents is not persuasive. The argument that there must be total conformity of thought and agreement by the City Attorney and petitioner otherwise confrontation may occur and "a nightmare" come to pass for the City Attorney's office is not soundly based. In essence it is a parade of horribles without any basis in fact in the case at bar or from experience. No "feud" developed in the case at bar nor was there a confrontation on any issue except the attempts of the petitioner to exercise his First Amendment rights. It is respectfully submitted that the balancing of interest cannot justify the abrogation of the petitioner's First Amendment rights.

(C) THE EQUAL PROTECTION VIOLATION CAUSE OF ACTION WAS IGNORED.

The complaint alleges that the petitioner was denied equal protection by the acts of the respondents in discharging him from his employment, asserting specifically in the second cause of action that the right to engage in active politics and run for elective office was one recognized in

the community and a right afforded those in similar employment. Ironically, the respondent, Brennan, himself had obtained his position as City Attorney when he ran for that office while employed as an Assistant District Attorney for Milwaukee County. This issue of equal protection was not addressed by either the Court of Appeals or the District Court.

CONCLUSION

For the reasons stated above certiorari should be granted and the decision of the United States Court of Appeals for the Seventh Circuit dated July 11, 1977 should be reversed.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1006

JAMES NEWCOMB,

Plaintiff-Appellant,

v.

JAMES BRENNAN and HENRY REUSS,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 76 C 357—**Robert W. Warren**, *Judge.*

ARGUED MAY 24, 1977—DECIDED JULY 11, 1977

Before SWYGERT and CUMMINGS, *Circuit Judges*, and MARKEY, *Chief Judge.*

SWYGERT, *Circuit Judge.* Plaintiff James Newcomb contends that his constitutional rights were violated when he was dismissed from his position as deputy city attorney of Milwaukee, Wisconsin. Newcomb was dismissed when, against the wishes of the city attorney, he announced his intention to run for Congress. We affirm the district court's dismissal of the complaint.

[1] The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

I.

In April 1976 Newcomb was employed by the City of Milwaukee as deputy city attorney. His superior was defendant James Brennan, the city attorney of Milwaukee. Newcomb informed Brennan that he intended to run in the Democratic Party's primary election for the office of representative from the Fifth District to the Congress of the United States, a post then held by defendant Henry Reuss. After allegedly consulting with Reuss, Brennan informed plaintiff that he disapproved of the candidacy and that plaintiff would be fired if he persisted in his plans to run for office. Following the formal announcement of plaintiff's candidacy and upon his continued refusal to withdraw from the race, Brennan fired plaintiff on May 3, 1976.

Newcomb then filed suit against Brennan and Reuss seeking injunctive and monetary relief for deprivation of his constitutional rights under 42 U.S.C. §§ 1983 and 1985. The district court granted a motion to dismiss the action on November 15, 1976, stating that plaintiff's discharge did not constitute a deprivation of his constitutional rights. The court acknowledged the general rule, established in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Illinois State Union Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972), that the dismissal of public employees for reasons of political patronage violates the First Amendment. The court noted, however, that both *Elrod* and *Lewis* created an exception to this general rule for public employees who occupy policymaking positions, and it held that plaintiff fell within this exception. It observed that the deputy city attorney is exempted from civil service,[2] has no term of office that is established in the City Charter, and has broad powers

[2] Wis. Stat. § 63.29(1) provides:

Civil Service for attorneys in office of city attorney.

(1) In any city of the first class the common council may by ordinance provide for civil service in the office of the city attorney except for the city attorney and his deputy.

and duties described in both the City Charter[3] and the Milwaukee Code of Ordinances.[4] From this judicial

[3] Milw. City Charter § 3.03 reads:

3.03 *City attorney, duties and powers.* The city attorney shall conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the common council. He shall, when required, furnish written opinions upon subjects submitted to him by the mayor or the common council, or any of its committees, or any other department of the municipal government. He shall keep a docket of the cases to which the city may be a party in any court of record as directed by the common council, in which shall be briefly entered all steps taken in each cause, and which shall, at all times, be open to the inspection of the mayor, comptroller, or any committee of the common council. It shall also be the duty of the city attorney to draft all ordinances, bonds, contracts, leases, conveyances, and other such instruments of writing as may be required by the business of the city; to examine and inspect tax and assessment rolls, and all proceedings in reference to the levying and collection of taxes and assessments; and to perform such other duties as may be prescribed by the charter and ordinances of the city. He shall have power to appoint a deputy city attorney, who shall be authorized to do all acts required by law of the city attorney. Assistant city attorneys appointed by the city attorney pursuant to city service laws and provisions shall be authorized, subject to the control and supervision of the city attorney or his deputy to do all acts required by law of the city attorney; provided that the city attorney shall be responsible to the city for all the acts of such deputy city attorney and assistant city attorneys.

[4] Milw. Code of Ordinances § 2-200.2(2) provides:

DEPUTY CITY ATTORNEY.

There is hereby created the position of deputy city attorney who shall be appointed by the city attorney and such position shall not be under civil service, and the city attorney shall be responsible for all the acts of such deputy city attorney. The deputy city attorney may be selected from among the assistant city attorneys in the office of the city attorney and, if so selected from among such group, while serving as deputy city attorney, such assistant shall continue to retain his civil service status and tenure provided for in this ordinance. The deputy city attorneys shall be required to take the oath of office as provided in the charter and may perform all duties and have all responsibility which are imposed by law in the ordinances and charter ordinances of the city on the city attorney.

notice of matters of public record, the court found that the deputy city attorney occupies a policymaking position and serves at the pleasure of the city attorney. Plaintiff now appeals the district court's decision.

II.

The gravamen of plaintiff's case is that his right to run for political office was protected under the First Amendment and that defendants abridged that right by causing him to be fired because he exercised it. The district court assumed that plaintiff's act of running for Congress was protected under the First Amendment and dismissed the complaint because it found, under the teaching of *Elrod* and *Lewis*, that the state's interest in permitting the city attorney to dismiss his subordinate for political reasons was of sufficient importance to justify the abridgment of plaintiff's First Amendment rights. Because we believe there is a substantial question whether the First Amendment encompasses plaintiff's interest in running for political office, we must resolve this issue before addressing the district court's reasons for dismissing the action.

Although the Supreme Court has frequently invalidated state action which infringed a candidate's interest in seeking political office, it "has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). Rather, it has relied on the right of association guaranteed by the First Amendment in holding that state action which denies individuals the freedom to form groups for the advancement of political ideas, as well as the freedom to campaign and vote for the candidates chosen by those groups, is unconstitutional absent a strong subordinating interest. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (*per curiam*); *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968). These decisions indicate that plaintiff's interest in seeking office, by itself, is not entitled to constitutional protection. *See Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1135 n. 81, 1218 (1975). Moreover, since plaintiff

has not alleged that by running for Congress he was advancing the political ideas of a particular set of voters, he cannot bring his action under the rubric of freedom of association which the Supreme Court has embraced.

We would therefore have to affirm the dismissal of the complaint without ever reaching the ground on which the district court relied if plaintiff's First Amendment claim was based solely on a purported right to seek public office. As we read the complaint, however, it implicates interests which are broader than a *per se* right to candidacy. This is not a case where the plaintiff was denied access to the ballot as a result of the state's administration of a facially neutral program regulating elections. *See, e.g., American Party v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971). Instead it is a case where the plaintiff's candidacy was burdened because a state official wished to discourage that candidacy in particular. Accordingly, if we assume that the allegations contained in the complaint are true, Brennan's conduct in firing plaintiff because Brennan disapproved of plaintiff's candidacy represented punishment by the state based on the content of a communicative act. The Supreme Court has repeatedly struck down state action regulating the content of expression. *E.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). *See also Hudgens v. NLRB*, 424 U.S. 507, 520 (1976). Thus, plaintiff's interest in running for Congress and thereby expressing his political views without interference from state officials who wished to discourage the expression of those views lies at the core of the values protected by the First Amendment.

We conclude that under the circumstances of this case plaintiff's interest in seeking office was protected by the First Amendment. Moreover, *Elrod* made clear that the state has no greater power to dismiss a public employee because he exercised a First Amendment right than it has to directly restrain free expression. 427 U.S. at 358-59. *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Therefore, the dismissal of the complaint can only be affirmed if the state's interest in permitting the

city attorney to fire his deputy for political reasons is of sufficient importance to justify the infringement of plaintiff's First Amendment rights.

III

A.

The district court's decision that in this case the state's interest outweighed individual rights turned on a finding that plaintiff was a policymaker. Plaintiff contends first that the district court erred in making this determination because it took judicial notice of facts not alleged in the complaint. He argues that on a motion to dismiss the court may consider matters outside the complaint only if these matters have been affirmatively presented to the court by the litigants. If the court decides not to exclude these matters, he asserts, it must then treat the motion as one for summary judgment and give the parties adequate opportunity to present pertinent material.

We cannot accept this argument. A court may take judicial notice of facts of "common knowledge" in ruling on a motion to dismiss. *Robinson v. Mammoth Life & Accident Ins. Co.*, 454 F.2d 698, 699 (7th Cir. 1971) (*per curiam*), *cert. denied*, 409 U.S. 872 (1972). We hold that matters of public record such as state statutes, city charters, and city ordinances fall within the category of "common knowledge" and are therefore proper subjects for judicial notice.

We must also reject plaintiff's further argument that the district court's determination that he occupied a policymaking position was erroneous even if the court properly took judicial notice of facts not alleged in the complaint. Although, as the Supreme Court noted in *Elrod*, "no clear line can be drawn between policymaking and nonpolicymaking positions, the nature of the responsibilities is critical" in resolving this issue. "An employee with responsibilities that are not well defined or are of a broad scope more likely functions in a policymaking position." 427 U.S. at 367-68. As deputy city attorney, plaintiff was given all the duties imposed

by law on the city attorney,[5] including conducting all the law business of the city, drafting ordinances, and supervising assistant city attorneys.[6] Moreover, under the Milwaukee City Charter he was in line to succeed the Mayor of the City of Milwaukee if a vacancy occurred in that office. We agree with the district court that these facts clearly established that plaintiff's duties were of the "broad scope" which the *Elrod* Court equated with a policymaking function.

B.

Plaintiff's final argument is that, even if he was a policymaker, the state's subordinating interest was insufficient to justify the abridgment of his First Amendment rights. He contends that the purpose of the policymaker exception contained in *Elrod* and *Lewis* is to ensure that the policies of a new administration are not frustrated by holdover employees from the old administration who are likely to be members of a different political party with different political philosophies. He asserts that in this case, by contrast, there is neither any evidence that he and Brennan are members of different political parties nor reason to think that his action in running for Congress would impede Brennan's performance of his duties as city attorney.

Plaintiff's interpretation of the scope of the policymaker exception in *Elrod* is not without merit. The language of the opinion[7] indicates that the Court's

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[5] *See* note 4 *supra*.

[6] *See* note 3 *supra*.

[7] The relevant portion of the Court's opinion stated:

> A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party. 427 U.S. at 367.

primary concern was with preventing employees who are members of a defeated political party from undercutting the policies of a new administration representing a different political party and thereby frustrating the will of the electorate. And while the language of Mr. Justice (then Judge) Stevens in *Lewis*[8] creating an exception to the general rule that public employees may not be fired for political reasons is broader than the Supreme Court's language in *Elrod*, the plaintiffs in *Lewis* were all employees who had been dismissed from government jobs because they refused to profess allegiance to the Republican Party. Thus, neither *Elrod* nor *Lewis* squarely faced the question of whether the policymaker exception should be extended beyond the paradigm situation in which a dismissed employee would, by the nature of his political affiliation, retard the effectuation of a new administration's policies.

We therefore must determine as a matter of first impression whether the state's interest in permitting Brennan to fire plaintiff outweighs plaintiff's First Amendment rights. We conclude that it does.

The deputy city attorney of Milwaukee functions in a highly discretionary role. He cannot perform his job by the simple exercise of ministerial competence. Rather, many of the decisions that he makes will involve implementation of the policies of the city attorney's office as a whole. Some of these decisions will actually create policy.

The elected official responsible for setting the policy of the city attorney's office is the city attorney himself. One of the major problems that he confronts in his job is ensuring that his policies are carried out by his subordinates, and that any policy-creating decisions

[8] The court in *Lewis* stated:

> Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials. Moreover, considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions. 473 F.2d at 574.

made by those subordinates conform with the broad objectives he chooses to pursue. This problem would become a nightmare for the city attorney unless he could demand the absolute loyalty of his policymaking deputy. If he lost confidence in his deputy, for whatever reason, his ability to perform his job would be severely hampered. Moreover, once an open rift developed between the city attorney and his deputy—even if the basis for the feud were unrelated to actual job performance—the city attorney's office could become a battleground in which little was accomplished, to the detriment of the citizens of Milwaukee. It is presumably for this reason that the Milwaukee City Charter and City Code permit the city attorney unfettered discretion to select his deputy and exclude the position of deputy city attorney from the civil service tenure which lesser attorneys in the city attorney's office receive.

The important public interest in permitting the city attorney to effectively implement his policies justified Brennan's action in firing plaintiff. Brennan obviously regarded plaintiff's refusal to drop his candidacy as an expression of disloyalty. Whether Brennan made a wise decision is beside the point, for it is not our function to judge the wisdom of the actions taken by municipal officials. Brennan had the power under state law and the City Code to dismiss his deputy for reasons of personal loyalty, and we hold that under the circumstances of this case his right to exercise that power was sufficiently important to override the First Amendment rights of plaintiff.[9]

[9] Since Brennan is not liable under the facts alleged, it follows that the mere allegations of conspiracy between defendants Reuss and Brennan are insufficient to establish the liability of Reuss under color of state law for purposes of 42 U.S.C. §§ 1983 and 1985. *Hansen v. Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975).

We agree with the district court that in deciding this case we need not reach the question of whether under the First Amendment Brennan could have fired plaintiff for reasons of racial, sexual, or religious bias.

The judgment of the district court is affirmed.

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APPENDIX B

DECISION OF DISTRICT COURT
(Formal Portions Omitted)

This is a civil action arising under 42 U.S.C. §§ 1983, 1985 and 28 U.S.C. § 1343 whereby the plaintiff above named seeks to recover damages and to enjoin and declare as unconstitutional certain deprivations of plaintiff's rights under the First, Ninth, and Fourteenth Amendments to the Constitution of the United States.

The political controversy which gave use to the instant action began in early April, 1976 when the plaintiff decided to announce his candidacy for the 5th Congressional District of Wisconsin. Plaintiff at that time was employed as the Deputy City Attorney of the City of Milwaukee. Prior to any formal announcement, plaintiff informed defendant James Brennan of his decision. Brennan, the City Attorney and the man responsible for hiring plaintiff, it is alleged, subsequently discussed the matter with defendant Henry Reuss, the incumbent Congressman from the 5th Congressional District. The two defendants allegedly agreed to coerce plaintiff into withdrawing his proposed candidacy by threatening to terminate his employment.

Allegedly, pursuant to this conspiracy, on April 23, 24 and 25, Brennan informed plaintiff that he disapproved of the proposed candidacy. Plaintiff was further advised that he would be fired if he persisted in running against defendant Reuss. Notwithstanding the foregoing, plaintiff announced his candidacy for the 5th Congressional District on April 26, 1976.

During the next week, the defendants allegedly conferred on the matter and defendant Brennan again threatened to fire plaintiff. Plaintiff refused to withdraw from the race, and on May 3, 1976, plaintiff was removed from his posi-

tion as Deputy City Attorney. Plaintiff commenced this action the same day and defendants subsequently moved to dismiss pursuant to rule 12 of the Federal Rules of Civil Procedure upon the ground that the complaint fails to state a claim upon which relief can be granted. The various other motions in the record need not be addressed in light of the following disposition of the motions to dismiss.

From the outset, it should be noted that the nature of plaintiff's position as a Deputy City Attorney is critical to the claim asserted herein. The Deputy City Attorney is specifically exempted from civil service by Section 63.29(1) of the Wisconsin Statutes.[1] No term of office is established by the City Charter and it is readily apparent that the deputy city attorney serves at the pleasure of the City Attorney. The duties are described in Section 3.03 of the Milwaukee City Charter which provides in pertinent part as follows:

> "... He [the city attorney] shall have power to appoint a deputy city attorney, who shall be authorized to do all acts required by law of the city attorney . . ."

The position of deputy city attorney is also described in Section 2-200.2(2) of the Milwaukee Code of Ordinances.[2] A brief review of the statutory framework recited herein clearly reveals that the deputy city attorney occupies a "policy-making" position. While no clear line distinguishes policy-making from nonpolicy-making positions," an employee with responsibilities that are not well defined or are of broad scope more likely functions in a policy-making position." *Elrod* v. *Burns,* 44 U.S.L.W. 5091, 5097 (June 28, 1976).

As the number two man in the City Attorney's office, plaintiff was directly responsible for the implementation of the policies of the City Attorney. The highly political and

sensitive nature of the position is self-evident. The sole question presented therefore is whether an individual in such a policy-making position may be discharged for reasons which are concededly political in nature and yet unrelated to the duties and responsibilities of that position.

Both the Supreme Court and the Seventh Circuit Court of Appeals have distinguished the situation involving patronage dismissals of policy-making employees from that involving nonpolicy-making employees. *Elrod* v. *Burns, supra; Illinois State Employees Union, Council 34* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972). In *Lewis,* the Court went on to state that:

> Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policy-making officials. Moreover, considerations of *personal loyalty,* or other factors besides determination of policy, may justify the employment of political associates in certain positions. (emphasis added) Id. at 574.

The Supreme Court also alluded to the need for *inter alia,* political loyalty in the selection or discharge of policy-making employees.

> A second interest advanced in support of patronage is the need for political loyalty of employees. . . . The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. *Elrod,* supra, at 5097.

Plaintiff argues that the patronage cases alluded to above are inopposite because the case at bar involves the infringement of an individual's right to seek political office and not

mere party affiliation. Although the right to seek political office is an important one, this Court is unable to distinguish the political nature of the deprivation alleged herein from those encountered in the patronage cases.[3] Moreover, plaintiff overlooks the breach of loyalty involved in plaintiff's attempt to unseat an apparent political friend and ally of the person at whose pleasure he serves. It is extremely difficult to ignore the obvious political overtones of the controversy presented herein. The Court is extremely hesitant to find a constitutional deprivation everytime a policy-making employee is dismissed for political reasons of some sort or another. The federal district court should not be used to settle interparty squabbles and, accordingly, the Court is of the opinion that plaintiff's discharge failed to give rise to a constitutional deprivation.

For the foregoing reasons,

IT IS ORDERED that the motions to dismiss brought in behalf of defendants Brennan and Reuss be and are hereby GRANTED.

So ordered this 15 day of November, 1976 at Milwaukee, Wisconsin.

/s/ *Robert W. Warren*
United States District Judge

FOOTNOTES:

[1] Section 63.29(1), Wis. Stats:

Civil Service for attorneys in office of city attorney.

(1) In any city of the first class the common council may by ordinance provide for civil service in the office of the city attorney except for the city attorney and his deputy.

[2] Section 2-200.2(2), Milwaukee Code of Ordinances:

(2) DEPUTY CITY ATTORNEY.

There is hereby created the position of deputy city attorney who

(footnote continued)

(footnote continued)

shall be appointed by the city attorney and such position shall not be under civil service, and the city attorney shall be responsible for all the acts of such deputy city attorney. The deputy city attorney may be selected from among the assistant city attorneys in the office of the city attorney and, if so selected from among such group, while serving as deputy city attorney, such assistant shall continue to retain his civil service status and tenure provided for in this ordinance. The deputy city attorney shall be required to take the oath of office as provided in the charter and may perform all duties and have all responsibility which are imposed by law in the ordinances and charter ordinances of the city on the city attorney.

[3] In *Elrod*, "[employees] were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives." 44 U.S.L.W. at 5094.

Notwithstanding the substantial infringement of plaintiffs' First Amendment rights of political belief and association alluded to above, the Court recognized an exception for those plaintiffs who were involved in policy-making positions. The substantial infringement of First Amendment rights involved in the instant case is, in the opinion of this Court, analogous to that found in *Elrod*. The Court expresses no opinion with regard to dismissals which are based on *nonpolitical* grounds such as race or sex and this opinion should not be construed as standing for the proposition that policy-making employees may be discharged for discriminatory reasons. *See*, Perry v. Sindermann, 408 U.S. 593 (1972).

APPENDIX C

COMPLAINT
(Formal Portions Omitted)

I. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1343, 42 U.S.C. 1983 and 1985. This is an action to recover damages and also to enjoin and declare as unconstitutional certain deprivations of plaintiff's rights under the First, Ninth and Fourteenth Amendments to free speech, due process and equal protection of the laws.

II. PARTIES

1. That the plaintiff is an adult residing at 8927 N. 70th Street, Milwaukee, and is an attorney by profession, and that prior to May 3, 1976 he was employed by the City of Milwaukee as the Deputy City Attorney of the City of Milwaukee.

2. That the defendant James Brennan, is an adult residing at 2756 N. 87th Street, Milwaukee, and is an attorney by profession and was at all times material herein the duly elected City Attorney for the City of Milwaukee.

3. That the defendant, Henry Reuss, is an adult purporting to reside in the City of Milwaukee and was at all times material herein the duly elected representatives to the Congress of the United States from the 5th Congressional District of Wisconsin with offices located at 517 E. Wisconsin Avenue, Milwaukee.

III. FIRST CAUSE OF ACTION

4. That during the month of April, 1976 the plaintiff did decide to announce his candidacy for the office of Congressional Representative to the Congress of the United States from the 5th Congressional District of Wisconsin and run against the defendant Henry Reuss in the primary election of the Democratic party.

5. That plaintiff did communicate his intention to run for public office to the defendant Brennan early in April, 1976, and the defendant Brennan initially did not evidence objection to the plaintiff's plans.

6. That plaintiff is informed and verily believes that after plaintiff advised defendant Brennan of his intentions the defendant Brennan did communicate with the defendant Reuss and with other persons unknown to plaintiff prior to the formal announcement by plaintiff of his candidacy, and that the defendant Brennan did conspire with the defendant Reuss and the persons unknown and agreed to attempt to coerce the plaintiff to persuade him to withdraw his proposed candidacy by threatening to terminate his employment.

7. That the defendant Brennan in furtherance of the conspiracy above-described did communicate threats to the plaintiff on April 23, 24 and 25, 1976 that unless plaintiff reconsidered his planned announcement and intention to run against defendant Reuss, that the plaintiff would be fired from his employment as Deputy City Attorney.

8. That on April 26, 1976 the plaintiff announced his candidacy to run against the defendant Henry Reuss.

9. That plaintiff is informed and verily believes that between April 26, 1976 and May 3, 1976 the defendants

Brennan and Reuss together with other persons unknown to plaintiff did conspire to accomplish the discharge of the plaintiff from his employment; during said period the defendant Brennan did confer with the defendant Reuss and others and in furtherance of the conspiracy did attempt to coerce plaintiff into withdrawing from the election by threatening that if he did not withdraw he would be fired.

10. That in furtherance of the conspiracy on May 3, 1976, the defendant Brennan did wrongfully discharge the plaintiff from his employment solely because plaintiff continued his intention to run against defendant Reuss.

11. That the discharge of the plaintiff was with the full knowledge and agreement of the defendant Reuss.

12. That the defendants and each of them acted intentionally and with malice and ill will toward plaintiff to wrongfully terminate the employment of the plaintiff in order to render him financially incapable of supporting his family and maintaining a political campaign against the defendant Reuss, in order to guarantee the re-election of the defendant Reuss.

13. That the acts of the defendants in furtherance of the conspiracy were under color of State and Municipal law.

14. That the discharge of the plaintiff pursuant to the conspiracy of the defendants was in violation of the rights guaranteed the plaintiff by the Constitution of the United States and the First, Ninth and Fourteenth Amndments thereof.

IV. SECOND CAUSE OF ACTION

15. Plaintiff realleges and incorporates by reference herein the allegations contained in the above paragraphs 1 through 14 as if fully set forth.

16. The acts of defendants Brennan, Reuss and others as described above, did individually and arbitrarily discriminate against plaintiff in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution specifically in that it was the recognized policy and practice to allow attorneys employed as city attorneys in the City of Milwaukee, or district attorneys in the County of Milwaukee to conduct political campaigns and pursue election to political office while retaining their positions on the staff of the municipal or county agencies.

V. REQUEST FOR RELIEF

17. That as a direct and proximate result of the intentional, malicious conspiracy aforedescribed and acts of the defendants in furtherance thereof, plaintiff was damaged and will be damaged in the future as follows:

a) loss of employment;

b) injury to reputation;

c) embarrassment, humiliation and mental anguish, all to his damage in the amount of One Million Five Hundred Thousand Dollars ($1,500,000).

18. That the defendants, in the course of the conspiracy to wrongfully terminate the employment of the plaintiff acted recklessly, intentionally and maliciously and in wanton disregard of the rights of the plaintiff and that by reason thereof the plaintiff is entitled to punitive and

exemplary damages in the amount of Three Million Dollars ($3,000,000).

WHEREFORE, the plaintiff, James Newcomb, demands judgment against the defendants and each of them jointly and severally in the amount of One Million Five Hundred Thousand Dollars ($1,500,000) compensatory damages and Three Million Dollars ($3,000,000) punitive damages, together with costs and reasonable attorney's fees.

/s/ *Robert E. Sutton*
Robert E. Sutton
Attorney for Plaintiff

ROBERT E. SUTTON
Attorney at Law
Cilento Building, Suite 202
1409 E. Capitol Drive
Milwaukee, Wisconsin 53211

APPENDIX D

DOCKET ENTRIES

Plaintiffs—NEWCOMB, James

Defendants—BRENNAN, James
REUSS, Henry

Cause—Civil rights action alleging unconstitutional termination of employment.

Attorneys—

For Plaintiff
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For defendant Brennan
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278-2601

For defendant Reuss
Robert H. Friebert
710 North Plankinton Avenue
Milwaukee, WI 53203
271-0130

Date	Nr.	Proceedings
5/25/76	1.	Complaint filed; summons issued. Jury demand.
6/ 4/76	2.	Notice of retainer of Maurice L. Markey, Thomas E. Hayes, Grant F. Langley & Patrick B. McDonnell, attorneys for deft. Brennan.

6/ 7/76	3.	Marshal's return of service of S & C; deft. Brennan served on 5/26/76, deft. Reuss served on 5/25/76.
6/14/76	4.	Deft. Brennan's motion to dismiss.
6/14/76		Deft. Brennan's brief in support of motion to dismiss.
6/15/76	5.	Deft. Reuss's motion to dismiss.
6/15/76		Deft. Reuss's brief in support of motion to dismiss.
6/15/76	6.	Deft. Reuss's motion for a more definite statement.
6/15/76		Deft. Reuss's brief in support of motion to make a more definite and certain statement.
6/21/76	7.	Deft. Reuss's motion for protective order.
6/21/76	8.	Notice of hearing on deft Reuss's motion for a protective order to be held on 6/23/76.
6/23/76	9.	Order (RWW) granting deft. Reuss's motion for a protective order; further ordered that the depositions scheduled for 6/24/76 by the pltf. not be held on that date.
7/ 7/76	10.	Marshal's return of service of summons & complaint; deft. Reuss served 7/2/76.
7/22/76	11.	Motion of deft. Henry S. Reuss for a protective order.
7/23/76	12.	Motion of deft. James Brennan for a protective order, with supporting brief.

8/ 5/76	13.	Order (RWW) denying subject motions for entry of an order barring discovery until resolution of the motion to dismiss.
8/12/76	14.	Pltf's motion for an order compelling discovery with supporting brief.
8/25/76		Defts' brief in opposition to pltfs' motion for an order compelling discovery.
8/25/76	15.	Affidavit of Jean K. Carney.
9/15/76		Deposition of Ron Marose, taken on 8/23/76 at Milw. Wis. by pltf.
9/15/76		Deposition of James Brennan, taken on 8/3/76 at Milw. Wis. by pltf.
9/16/76		Deposition of Jean K. Carney, taken on 8/3/76 at Milw. Wis. by pltf.
9/30/76		Deposition of Henry Reuss, taken at Milwaukee, Wisconsin on 8/18/76 at Milw., Wis. by plaintiff.
10/12/76	16.	Deft. Reuss's request for production of documents.
10/18/76		Deposition of Kenneth Lamke taken at the instance of the pltf. in Milwaukee, Wisconsin, on 8/3/76.
11/15/76	17.	Memorandum and order (RWW) granting defts' motions to dismiss.
11/15/76	18.	Judgment entered; copies mailed to the parties.

11/16/76		Status report (RWW).
11/22/76	19.	Pltf's notice of appeal to the U.S. Court of Appeals, 7th Circuit; copy mailed to parties.
11/22/76		Copy of docket entries and notice of appeal sent to U. S. Court of Appeals, 7th Circuit.
12/27/76	20.	Letter from pltf's. atty. complying with Rule 4(a).
		Certificate of Clerk.